148 U.S. 648

RECORD, CASE No. 13,723.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 142.

HERMANN ISAACS, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. JONAS, COLLECTOR OF THE PORT OF NEW ORLEANS, LOUISIANA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 10, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 30, 1892.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

HERMANN ISAACS, Plaintiff in Error,
versus
B. F. JONAS, Collector, etc., Defendant in Error. } No. 11182.

J. R. Beckwith, Esquire, for plaintiff in error; Charles Parlange, Esquire, U. S. attorney, for defendant in error.

Writ of error returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the second Monday of October, A. D. 1889.

Transcript of Record.

1 Circuit Court of the United States, Eastern District of Louisiana.

HERMAN ISAACS
vs.
B. F. JONAS, Collector. } No. 11182.

Petition. Filed Dec. 17, 1885.

To the honorable the judges of the circuit court of the United States for the eastern district of Louisiana:

The petition of Herman Isaacs, a citizen of the United States residing in the city of New Orleans, State of Louisiana, respectfully shows—

That B. F. Jonas, who is collector of customs for the port of New Orleans and of the collection district — which said port is situated, is justly indebted unto your petitioner in the full sum of twenty-two thousand and ten $\frac{45}{100}$ dollars, for that your petitioner, on or about the 10th day of August, A. D. 1885, imported into the United States, at the port of New Orleans, twenty-five cases of paper, of the character used for making cigarettes, from France; that the value of said paper was 17,018.30 francs; that he made one entry of the same at the custom-house in New Orleans and made application to withdraw the same for consumption; that the lawful rate of duty which
2 the said defendant as collector of customs as aforesaid could lawfully demand of your petitioner is fifteen per centum ad valorem on the value of said goods as aforesaid, which was and is the sum of $484.35, which was and is the rate of duty as established by the laws of the United States; that said collector, B. F. Jonas, wrongfully refused to allow your petitioner the possession of said goods or to withdraw the same for consumption upon the payment of said lawful duty as aforesaid, but wrongfully and unlawfully demanded of your petitioner the full sum of $1,775.35 as the alleged duty due on said imported merchandise, being seventy per centum

ad valorem on the said value of said merchandise, and did wrongfully and unlawfully assess the said last-mentioned sum of money against petitioner as the alleged duty on said merchandise.

That your petitioner in due form appealed to the Secretary of the Treasury from said erroneous and unlawful assessment, protesting against the same and the decision of the defendant as collector of customs assessing said duty at 70 per cent. ad valorem, as will more fully and at large appear by a copy of said protest and appeal, filed with this petition and made part hereof, marked A; that on the 21st day of September, A. D. 1885, the Secretary of the Treasury or the assistant Secretary of the Treasury, having authority in that behalf, rejected your petitioner's appeal and affirmed the decision of the said defendant as collector of customs as aforesaid; that thereupon the said defendant unlawfully demanded said seventy per centum as the dutiable value of said merchandise of and from your petitioner as the duty on said merchandise, and your petitioner

3 was unlawfully compelled to pay the same to the full sum of twenty-two hundred and sixty dollars and thirty cents (2,260.30); that the sum so demanded was and is in excess of the true and lawful duty due on said merchandize in the full sum of seventeen hundred and seventy-five dollars and ninety-five cents, $1,775.95; that your petitioner was compelled to pay said excessive sum aforesaid in order to obtain possession of his said merchandize; that your petitioner paid said excess of duty aforesaid under protest and reserved his right in law to recover back the said excess of duty so demanded as aforesaid; that said appeal was determined and the decision of said defendant affirmed on the 21st day of September, A. D. 1885, as will more fully and at large appear by a copy of the letter of the said Secretary of the Treasury, filed with this petition and made a part hereof, marked "B."

That the said protest of your petitioner was in writing in due form, as well as said appeal, and the full text thereof is also herewith filed and made a part of this petition, marked "C" & "D" and "E."

That said appeal was determined on the twenty-first day of September, 1885; wherefore the said defendant is justly indebted to the plaintiff in the full sum of seventeen hundred and seventy-five dollars and ninety-five cents ($1,775.95).

And your petitioner further shows unto your honors that the said defendant is also indebted to plaintiff in the further sum of four hundred and thirty-four dollars and fifty cents ($434.30), for that this defendant also imported from France another lot of merchandise on another vessel, to wit, the S. S. Amerique, to New York, and

4 the steamer Excelsior, from New York to New Orleans, in bond; that said merchandise consisted of 23 cases of a manufacture of paper or pasteboard, on which the lawful duty was only one hundred and eighteen dollars and fifty cents ($118.50), being 15 per cent. ad valorem on the value of $790; that the said defendant assessed and unlawfully demanded of your petitioner a duty of 70 per cent. ad valorem, or the full sum of five hundred and fifty-three dollars, being $434.50 in excess of the lawful *delay* charg-able against said merchandise; that plaintiff protested against

said decision and appealed therefrom to the Secretary of the Treasury within the time allowed by law, and on the 21st day of September the said Sec. of the Treasury rejected said appeal and affirmed the unlawful decision of said defendant, as will more fully and at large appear by a copy of the text of said protest and appeal and the decision of the Sec. of the Treasury thereon, hereto annexed and made a part of the petition, marked G and F.

That in order to obtain his goods plaintiff was compelled to pay said unlawful sum of $553, which was and is $434.50 in excess of the sum which said defendant could lawfully demand or exact of plaintiff for duty on said merchandise; that in order to obtain said goods plaintiff paid to defendant said sum so unlawfully demanded under protest as to all of said excess of duty demanded by defendant. Wherefore by reason of the premises said defendant is indebted to the plaintiff in the further sum of four hundred and thirty-four dollars and fifty cents.

That all of said protests and appeals were taken in due form and in due time for the reasons set forth in the said papers herewith filed, to which plaintiff at all times refer for certainty, and
5 that both of said appeals were determined on the 21st day of September, A. D. 1885.

Wherefore and by reason of the premises the said defendant, B. F. Jonas, collector as aforesaid, is justly indebted to plaintiff in the full sum of twenty-two hundred and ten dollars and forty-five cents, $2,210.45.

Plaintiff prays that the said defendant, B. F. Jonas, collector of the port of New Orleans and of the collections district to which said port belongs, may be cited to answer this petition, and that after due proceedings had he be condemned to pay your petitioner the full sum of twenty-two hundred and ten dollars and forty-five cents ($2,210.45), with interest from judicial demand, and all costs of suit and for all general relief, &c.

(Signed) J. R. BECKWITH,
Att'y for Plaintiff.

Protest Marked A. Filed with Petition Dec. 17, 1885.

NEW ORLEANS, 2 *Sept.*, 1885.

SIR: I hereby protest against the liquidation of my warehouse entry, assessing duty at the rate of 70% ad valorem on H. I. 4857–81, 25 cases manufacture of paper ex S. S. Legislator, 10 Aug., 1885, said paper cut to special sizes in leaves three inches in length
6 and one and one-half inch in width. I claim that this paper is provided for in Schedule M under the provisions for "paper, manufacture of, not specially enumerated or provided for, at 15% ad valorem," and request the reliquidation of this entry.

Hon B. F. Jonas, collector of customs.

Copy of Protest upon Import Entry of Hermann Isaac for S. S. Paris, June 2d, from Bordeaux, Marked A and Filed with Petition Dec. 17, 1885.

NEW ORLEANS, 24 *July*, 1885.

I hereby protest against the liquidation of this entry assessing duty at the rate of 70% ad valorem on H. I. 4142–57, 16 cases manufacture of paper cut to special sizes in leaves 3 inches in length and one and one-half inches in width. I claim that the paper is provided for in Schedule M under the provision for "paper, manufacturer of, not specially enumerated or provided for, at the rate of 15% ad valorem."

(Signed) p. pr. H. ISAAC,
G. W. RUEFF.

Hon. B. F. Jonas, collector of customs.

7 *Decision of the Secretary of the Treasury, Marked Exhibit B. Filed with Petition Dec'r* 17, 1885.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Sept.* 21, 1885.

Collector of customs, New Orleans, La.

SIR: The department is in receipt of your letters of the 7th and 9th instant transmitting the appeals hereinafter described of Mr. Hermann Isaac from your assessment of duty at the rate of 70% ad valorem on certain cigarette paper, imported in the vessels named and returned by the appraiser at your port as smoker's articles, dutiable under T. I., new, 476.

The appraiser reports that the merchandise in question is identical in character with that which formed the subject of department's decision of the 3rd instant. See weekly circular dated September 5, No. 133, paragraph 4.

Your assessment of duty, therefore, being in accordance with said decision, is hereby affirmed on the appeals in question, to wit:

1,963 m. per Paris, June 3rd, 1885.
2,722 m. Legislator, Aug. 10, "
2,496 m. " 24, "
2,495 m. " 10, "

Very respectfully,

(Signed) CHAS. E. COON,
Assistant Secretary.

8 Hermann Isaac, sole agent and attorney-in-fact for the U. S., 69 Canal street.

NEW ORLEANS, LA., ——, 188–.

S. S. Legislator from Liverpool.

25 cases cut cigarette paper, value 17,018.30, $3,229, ass.

70 %	2,260 30
Should be 15 %	484 35
Due me	$1,775 95

Hermann Isaac, sole agent and attorney-in-fact for the U. S., 69 Canal street.

NEW ORLEANS, LA., ——, 188–.

Invoice of 25 cases shipped via Liverpool:

H. I.	4857–4864, 504 pages	de pap.	400–175	8.10---	4,082	40
	4865–4871, 672	de	300–175	7.70---	5,174	40
	4872–4874, 285	de	200–275	7.10---	2,023	50
	4875–4877, 216	d	240–225	9.20---	1,987	20
	4878–4881, 336	d	300–175 gd.	10.30---	3,460	80
		Emball----	21	240		
			4	50	290	00
					fr. 17,018	30

9 *Protest Marked Exhibit C.*

Same as Exhibit A.
Copied at page 5 of this transcript.

Protest Marked Exhibit D.

Same as Exhibit A.
Copied at page 6 of this transcript.

Appeal Marked Exhibit E.

NEW ORLEANS, *Aug.* 12, '85.

Hon D. Manning, Secretary of the Treasury, Washington, D. C.

SIR: I hereby appeal from the decision of the collector of customs at this port exacting duty at the rate of 70 % ad valorem on certain paper imported by me, p'r F'ch S. S. Paris, from Bordeaux June 2d, 1885.

The paper in question is cut to special size in leaves about 3 inches in length to 1½ inch in width, is intended for use in the manufacture of cigarettes, books, and is claimed to be dutiable under schedule M. T. J., new, 388 under the provision for "paper, manufacturers of not specially enumerated or provided for at the rate of 15 % ad valorem."

It is proper to state that importations of this description
10 of paper has been made at this port by —— ——, and a duty of 15 % only charged, and that prior to importing this lot of paper I submitted samples to the appraiser of merchandise, who stated that the rate of duty would be 15 % ad valorem.

Very respectfully, —— ——.

Decision of the Secretary, Marked Exhibit G.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *Sept.* 21, 1885.

Collector of customs, New Orleans, La.

SIR: The Department is in receipt of your letters of the 8th and 10th instant transmitting the appeals (2493*m*, 2494*m*, and 2790*m*) of Mr. Hermann Isaacs from your assessment of duty at the rate of 70 per cent. ad valorem on certain pasteboard covers for books of cigarette paper, imported per "Excelsior" August 19th and 24 last and returned by the appraiser at your port as smokers' articles, dutiable under T. I., new, 476.

The appellant claims that the merchandise in question is dutiable under the provisions in paragraph 388, T. I., new, for manufacturers of paper not specially enumerated or provided for, at the rate of 15 % ad valorem. The articles in question are the covers of the books of cigarette paper, which were held by the Depart-
11 ment's decision of May 7th, 1884 (S. 6334), to be dutiable as smokers' articles. They consist of pasteboard covers, having printed thereon a registered trade-mark of the manufacturers (La Croix Fils), together with the name of the manufacturers and other matter. A small elastic band is permanently fastened to the margin of each cover for the purpose of securely holding within the cover the leaves of cigarette paper. The article is used exclusively by smokers, and, it is understood, is classified by the appraiser at the port of New York as a smoker's article. If imported in connection with the leaves of cigarette paper, which those articles are intended to cover, they would be dutiable at the rate assessed, in accordance with the decision (S. 6334) above mentioned.

The Department is of the opinion that the appellant cannot escape the payment of duty which would be applicable in such cases by separate importations of the leaves and covers for the evident purpose of securing a lower rate.

Your assessment of duty is accordingly affirmed.

Very respectfully,

(Signed) CHAS. E. COON,
Assistant Secretary.

Hermann Isaac, sole agent and attorney-in-fact for the U. S., 69 Canal street.

NEW ORLEANS, LA., —— —, 188–.

Morgan Line S. S. Excelsior, Aug. 19th, 1885.

12 Port of original importation, New York, per S. S. Amerique.

23 cases covers:

Value, $790, at 15%	$118 50
Charged 790 at 70%	553 00
Due me	$434 50

ANGOULÉME *te* 18 *Juin* 188–.

Mr. T. P. Smyth, New York Doit.

J P S	4882–4890	254	400	couvertures	175–225					
	4891–4892	51	700	do	275	-----	6	60	3349	50
	4893–4900	201	400	do	125					
	4901–4904	100	800	do	175	Gd--	7	40	745	90
	4905–4908		350	K vs Maculatures	paible	20 %			70	
	4909–4913		5	caisses affiches						
	4914		1	" ficelle						
				Emballaye 507500 couvertures						
					at 0. f 40		203			
				do 100800	0. 60		6050		263	50
	885.7800								4428	90

13 *Protest, Marked Exhibit H, Filed with Petition.*

SIR: I hereby protest against the assessment of duty at the rate of 70% ad valorem on certain 23 cases of manufactured paper, J. P. S. #4882–491, and also against the action, including fs. 263.50, charges for tacking in the dutiable value of the paper in question.

I claim, first, that the articles in question are incomplete in themselves, being covers for cigarette paper, to be manufactured in this country into books; that in the present state, without further manufacture and without the leaves of paper, the cover is of no use to a smoker, and cannot in any sense be considered as a smoker's article.

I claim, second, that the paper covers are provided for in Sched. M, T. I., new, 388, under the provisions for "paper, manufactures of, not specially enumerated or provided for," at the rate of 15% ad valorem, and claim to have the amount refunded. I further claim that the book covers being purchased by the thousand, the charge for packing is not a dutiable one under section 7, act of March 3d, 1883. —— ——.

Hon. B. F. Jonas, collector of customs.

Protest, Marked Exhibit H, Filed with Petition.

Hon. D. Manning, Sec'y of the Treasury, Washington, D. C.

SIR: I appeal from the decision of the collector of customs
14 for this port exacting duty at 70% ad valorem on H. i. 4857–81, twenty-three cases paper ex Brit. S. S. Legislator from L'pool.

I claim that this paper is provided for in Schedule M, T. I., new, 388, under the provision for paper, manufacturers of, not specially enumerated or provided for and dutiable at 15 % ad valorem.

Respectfully, —— ——.

Protest, Marked Exhibit H, Filed with Petition.

NEW ORLEANS, *Sept.* 3*d*, '85.

Hon. D. Manning, Secretary of the Treasury, Washington, D. C.

SIR: I have the honor to enclose herewith my protest against the assessment of duty at the rate of 70 % on J. P. S. 4882–4904, twenty-three cases manufacturers of paper, ex S. S. Excelsior from New York and for which a re-warehouse entry is made.

I new beg to appeal from the above-made assessment of 70 % ad valorem on the following grounds, viz: First. I claim that the article in question (a sample of which is herewith enclosed for your inspection) is in itself totally incomplete and is merely a covering for cigarette paper filled with leaves of paper to roll tobacco in to have a cigarette. It is to be manufactured in this country into
15 books, with leaves cut to its size for the purpose mentioned, and that without being filled with leaves cut to its size it is of no use to a smoker and is not considered as a smoker's article. Second. I claim that the article in question is covered by Schedule M, T. I., new, 388, under the provisions for "paper, manufacturers of, not specially enumerated and provided for," at 15 % ad valorem. Hoping that my protest be favorably considered, I remain, sir,

Very respectfully, —— ——.

Answer. Filed Dec. 22, 1885.

Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.

HERMAN ISAACS
vs.
F. B. JONAS, Collector Customs, &c. } No. 11182.

Now comes the defendant, F. B. Jonas, collector of customs in and for the collection district of New Orleans, and for answer to plaintiff's petition denies all and singular the allegations therein contained, and prays to be hence dismissed with costs.

(Signed) J. W. GURLEY,
Ass't U. S. Att'y.

16 *Marshal's Return.*

Received Dec. 22, 1885, by the U. S. marshal, and on the 22 day of Dec., 1885, I served a true copy of the within answer of the United States on Mr. Herman Isaac by handing the same to him in person.

(Signed) R. B. PLEASANTS,
U. S. Marshal, E. D. of La.
JOHN BAKER,
Deputy U. S. Marshal, E. D. of La.

Stipulation and Agreement to Extend Time for Filing Bill of Particulars. Filed March 14, 1887.

United States Circuit Court, Eastern District of Louisiana.

HERMAN ISAACS
vs.
B. F. JONAS, Coll. } No. 11182.

It is stipulated and agreed between the parties plaintiff and defendant, through their respective attorneys, in the above entitled and numbered cause that the time within which plaintiff is called
17 upon to furnish and file a bill of particulars, as provided for in sect. 3012 of the Rev. Stat. U. S., be extended from this date to and including the first day of April, 1887.

And it is further mutually stipulated and agreed that within the extended time no judgment of *non pros.* will be taken against plaintiff, and that if bill of particulars be filed within extended time, then it shall be deemed within the time prescribed by law and serving all the purposes thereof.

(Signed) CHARLES PARLANGE,
U. S. Attorney.
J. R. BECKWITH,
Att'y for Pl'tiff,
Per JNO. B. FISHER.

New Orleans, March 14th, 1887.

Bill of Particulars. Filed July 5, 1887.

Circuit Court of the United States, Eastern District of La.

HERMANN ISAACS
vs.
B. F. JONAS, Collector, &c. } No. 11182.

The annexed is the bill of particulars in this cause as far
18 as plaintiff is enabled to make the same, the record being in the possession of the defendant. The precise date of the decision of the Secretary of Treasury the plaintiff, being without a record thereof, is unable to state other than that such determining was within a short time before the institution of the suit.

(Signed) J. R. BECKWITH,
Att'y for Plaintiff.

Original Invoice on File in New York, Entered on an Extract of Invoice Certified by Collector of Customs, N. York.

Imported by Hermann Isaac from New York in bond Aug't 19, '85, by Morg. bonded S. S. Excelsior, the same having been originally imported to New York from Havre ex S. S. Amerique July 15, '85.

J. P. S. 4882–4904. 23 cases paper covers for cigarettes papers. Invoice from L. Lacroix Fils, Angouleme; entered at N. Orleans custom-house August 19, '85.

Value, $790, at 70, $553 00, as smokers' articles, and paid; claim to be man'f. of paper,

at 15 %----------118 50

Excess paid-- $434 50

Protest filed August 27, '85, and entry liquidated Aug. 24, '85.

Imported by Hermann Isaac by way of Liverpool, ex S. S. Legislator from Liverpool, Aug't 10, '85, invoice from L. Lacroix Fils and dated Angouleme, June 17, '85.

H. E. 4857–'81. 29 cases cigarette papers.

19 Value entered and duty paid on 3,229 at 7%, 2,260 30, as smokers' articles.

Claim to be man'f. of paper F. O. P. for " at 15%, 484 35

Excess paid, &c.---------- ---------- 1,775 95

Protest attached to entry and dated September 2, '85, and entry liquidated August 31, '85.

Empanneling of Jury, Hearing, and Continuance.

Extract from the Minute Book, November Term, 1888.

NEW ORLEANS, WEDNESDAY, *March* 20, 1889.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

HERMAN ISAAC
vs.
B. F. JONAS, Collector. } No. 11182.

This cause was called for trial, J. R. Beckwith appearing for plaintiff, Charles Parlange, United States attorney, for defendant, when the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit: 1, Geo. H. Frost; 2,
20 David Wilson; 3, G. W. Kellar; 4, Urban Fomento; 5, Wm. Gregg; 6, Jno. C. Finney; 7, Felix Veau; 8, T. J. Boswell; 9, Louis Herman; 10, E. C. Seawell; 11, C. E. Neal; 12, Arthur Garic, when Geo. H. Frost was appointed foreman of the said jury. After hearing the pleadings and the evidence in part the court ordered the cause to go over until to-morrow at 11 a. m.

Mistrial.

Extract from the Minute Book, November Term, 1888.

NEW ORLEANS, THURSDAY, *March* 21, 1889.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

H. ISAAC
vs.
B. F. JONAS, Collector, &c. } No. 11182.

This cause, as continued from yesterday, was this day resumed and the jurors empanneled in the cause, as well as the counsel for the respective parties, being all present, the trial was proceeded with and further evidence heard; whereupon, during the trial, it having appeared that remarks had been made to one of the jurors in the cause during the recess by one of the witnesses about the case, it was ordered by the court, with the consent of the counsel
21 for the parties, that the said jury be discharged from further consideration of the cause, and that a mistrial be certified therein.

Empanneling of Jury, Hearing, and Continuance.

Extract from the Minute Book, November Term, 1888.

NEW ORLEANS, THURSDAY, *March* 28, 1889.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

H. ISAACS
vs.
B. F. JONAS, Collector, &c. } No. 11182.

This cause was called for trial—J. R. Beckwith appearing for plaintiff; Charles Parlange, U. S. attorney, for the defendant—when the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit: 1, D. R. Graham; 2, S. D. Marks; 3, Rob't Moore; 4, P. H. Gemming; 5, W. H. Seymour; 6, Wm. Graner; 7, Wm. Lorenzin; 8, H. S. Russell; 9, Pat. Creagh; 10, Peter Coyle; 11, J. B. Dunlap; 12, C. B. Wilson; when D. R. Graham was appointed foreman of the said jury,
22 and by agreement of counsel for the respective parties the case was continued until to-morrow at 11 a. m.

Order: Juror Excused.

Extract from the Minute Book, November Term, 1888.

NEW ORLEANS, WEDNESDAY, *April* 3, 1889.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HERMAN ISAACS
vs.
B. T. JONAS, Collector. } No. 11182.

By agreement and consent of counsel for the parties in this cause in open court, it is ordered that Chas. B. Wilson, one of the jurors empanneled in this cause, be excused from further service on said jury, and that the cause proceed with eleven jurors.

Hearing and Verdict.

Extract from the Minute Book, November Term, 1888.

23 NEW ORLEANS, FRIDAY, *April* 12*th*, 1889.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

HERMAN ISAACS
vs.
B. F. JONAS, Collector. } No. 11182.

This cause, as continued from yesterday, was this day resumed, and the counsel for the respective parties, as well as the eleven jurors in the cause, being all present, the trial was proceeded with. After hearing arguments of counsel and receiving a charge from the court the said jury retired to deliberate as to their verdict. After due deliberation the said jury returned into court, and then and there, through their said foreman, did render and deliver the following verdict:

NEW ORLEANS, *April* 12, 1889.

We, the jury, find a verdict for the defendant.

D. R. GRAHAM, *Foreman.*

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Rule for New Trial. Entered and Filed April 16*th*, 1889.

24 Circuit Court of the United States, Eastern District of Louisiana.

HERMAN ISAACS
vs.
B. F. JONAS, Collector. } No. 11182.

And now comes the said plaintiff, by his attorney, J. R. Beckwith, and moves the court that the verdict of the jury be set aside and a new trial granted for the following reasons:

1st.

That the verdict of the jury is against the law and the evidence.

2.

That the court erred in its charge to the jury as given on the trial.

And on motion of said attorney it is ordered that this motion be set for trial on Saturday, the — day of ——, 1889, at 11 o'clock a. m., and that the defendant or his counsel be notified thereof.

Order: New Trial Refused.

Extract from the Minute Book, April Term, 1889.

25 NEW ORLEANS, THURSDAY, *May 9th*, 1889.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

HERMAN ISAACS
vs.
B. F. JONAS, Collector. } No. 11182.

This cause came on to be heard on the motion herein filed by the plaintiff for a new trial and was submitted by the counsel for the parties respectively, on consideration whereof it is ordered that the said motion for a new trial be refused, and that the verdict and judgment herein remain undisturbed.

Bill of Exceptions. Filed April 12th, 1889.

United States Circuit Court, Eastern District of Louisiana, at the November Term Thereof, A. D. 1888.

HERMANN ISAACS
vs.
B. F. JONAS, Collector, etc. } No. 11182.

26 Be it remembered that afterwards, to wit, at the November term of this court for the year 1888, this cause came on for trial before his Hon. Edward C. Billings, presiding in said court, upon the issues joined herein on the pleadings, said plaintiff and said defendant being respectively represented by their said counsel, and also came a jury, empanelled in due form, to try the issue, and that it was agreed between the respective parties hereto, without contention, that said plaintiff imported said goods and merchandise described in plaintiff's petition herein from a foreign country or place, as set forth in the petition herein, and that the cigarette paper in the form in which it was — imported direct to the port of New Orleans, where the entry of withdrawal for consumption was made, as stated in said petition; that the paper when imported was cut into small pieces of the size proper for making cigarettes and was put up in packages—wrapped in paper—the packages being about 6 or 8 inches square, and that these packages were again enclosed in large cases or boxes for sea transportation; that the contents of each of the smaller packages referred to were made up of said

small pieces of paper, cut to the size proper and of the proper character of paper for making cigarettes; that said cigarette paper as imported was in no manner attached together in any form of binding, but was separated into divisions of about 250 pieces of paper by the interposition of a piece of paper of a different color cut of the same size, so that it subdivided the paper into the divisions of the proper size and number of leaves for the contents of the book of leaves of cigarette paper of the ordinary size of such
27 books as sold in the markets; that the sample of said paper annexed to this bill of exceptions, made part thereof and marked "A," shows the condition and size and manner of the subdivision of said paper, by colored sheets, at the time of the entry at the custom-house in New Orleans; that the "covers" described in the petition were not imported directly to the port of New Orleans, but first came from a foreign country to the port of New York, where the goods were entered for transportation to the port of New Orleans and were transported in bond to the port of New Orleans in due form, and that at the time that the said plaintiff made entry for withdrawal for consumption, on payment of duties, for the paper above described he simultaneously made a like entry for withdrawal of the said "covers" at the said custom-house at the port of New Orleans; that the said importations and shipments were represented by separate invoices, documents, and entry, and that the "covers" hereto annexed, marked sample "B," *is* of the same character and description as the said importation of "covers;" that at the time of making said entry of each of said importations the said plaintiff claimed and demanded of the customs authorities of the port of New Orleans that said goods be classified as manufactures of paper or of which paper was or is a component port, under that provision of Schedule "M" of the act of Congress of March 3, 1883, chapter 121, that reads: "Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act, 15 per centum ad valorem," claiming that the papers as cut and in the form in which the same were imported, and the covers in the form and condition in which
28 the same were imported, and the covers in the form and condition in which they were imported, were and are manufactures of paper or manufactures of which paper is a component material within the range, meaning, and purview of said provision of "Schedule M," and demanded that he be allowed to enter and withdraw said merchandise for consumption, upon the payment of 15 per centum ad valorem as duty and no more; that the said customs authorities at said custom-house at New Orleans refused to allow the entry and withdrawal of the said good- at the said rate of duty of 15 per centum ad valorem, and with the classification so demanded by the said plaintiff, but, of the contrary thereof, classified said goods included in both of said importations and entries as smokers' articles, claiming that the same came under the provision of that paragraph of Schedule "N" of said act of 1883 that reads: pipes, pipe bowls, and all smokers' articles whatsoever, not specially enumerated or provided for in this act, 70 per centum

ad valorem; common pipes of clay, 35 per centum ad valorem," and demanded of the plaintiff the payment of 70 per centum ad valorem duty before the said customs authorities would deliver the goods to the plaintiff; that there was no dispute between the parties as to and concerning the dutiable value of said goods, the only contention being as to the classification thereof for duty; that in order to obtain possession of said goods the plaintiff paid the 70 per centum ad valorem demanded of him by the said customs authorities, paying the same under protest; that he made protest in due form and time, and that the grounds of said protest were and are the same as shown in the exhibit of protest herein and made
29 a part of this bill of exceptions; that appeal was made to the Secretary of the Treasury in due time and in due form, and that the plaintiff's said appeal was rejected and the customs authorities at the port of New Orleans sustained in their decision in respect to said classification and duty, and that this suit was brought within the time allowed by law; that if the plaintiff was entitled to recover anything in this suit he was entitled to recover the sums named and set forth in the prayer of his petition herein.

That it became and was a contention and issue in this cause between the parties thereto whether such goods as imported as above set forth and withdrawn for consumption were and are smokers' articles under "Schedule N" of said act of 1883, at the rate of 70 per centum ad valorem, or whether the same were dutiable under "Schedule M" as manufactures of paper or of which paper is a component material and subjected only to the rate of duty of 15 per centum ad valorem, the plaintiff contending that it was immaterial whether the goods were used by smokers or not; that even if it was admitted that the articles as imported in the form as imported were smokers' articles or used by smokers, the goods in the form as imported are goods "provided for in this act" at 15 per centum ad valorem duty, and therefore exempted from the 70 per cent. duty provided for in respect of the smokers'-articles paragraph of Schedule "N;" the plaintiff further contending that, under the true and lawful construction of the smokers'-article paragraph of "Schedule N," neither the "covers" nor the paper, as im-
30 ported, were "articles" in the just sense and true construction of that paragraph and the true and just construction of the word "articles" as used in that paragraph. The plaintiff further contends that at the time of the importation and at all times prior to the withdrawal for consumption the goods were not in a state of manufacture into any article, but simply materials to be manufactured into cigarette books after the goods had become part of the goods and merchandise of the country, duty paid; that if such goods be classified as anything but material to be used in future manufactures, the goods could not be classified as smokers' articles in any just and proper construction of the phrase "smokers' articles" as used in the act of Congress of 1883, because if said paper was ultimately used as cigarette paper by smokers the paper itself was to be consumed by the smoker, and was rather smokers' material than a smoker's article for that reason.

In order to sustain the issue upon his part the plaintiff produced and gave to the jury evidence tending to show that the paper of which the small cut papers were made was made of a peculiar material and by a process fitting it to be used as wrappers for cigarettes, and that the paper was manufactured in large sheets and afterwards cut into the form of small pieces of paper as imported, before importation, by machines contrived for that purpose; that the paper was so cut to adopt it to use as wrappers for cigarettes; that cigarettes, as manufactured, consist of a small quantity of disintegrated tobacco leaves, wrapped about and held in place by the paper, and that in consumption both the tobacco and the paper were set on fire and both consumed or smoked by
31 the smoker; that it was the intention of the plaintiff at the time of importation and his motive in making said importation in said form to manufacture the said material into what are known as cigarette books; that the process of such manufacture is to separate the paper as imported where the colored leaves or subdivisions are located in the paper as imported, and with a brush cover one edge of the paper with flour paste, glue, or some adhesive cement adapted to cement leaves together at one edge, and then cement the paper into the covers as they are imported; that as to and concerning this particular importation a large portion thereof was so put up and cemented into books by the plaintiff after the same came into his possession by withdrawal and payment of duties. This was done at the expense of about $400 for hire of workmen to do the work; that a portion of the paper as imported was sold directly to manufacture-s of cigarettes, to be used in their factories in making cigarettes for sale as a manufacture and article of commerce; that as to this particular kind or manufacture of paper the plaintiff was the sole importer thereof into the United States by special arrangement with the foreign manufacturers thereof; that as an article of retail sale or jobbing and sale to the retail dealers the paper has always been sold in this country in the form of books consisting of a certain number of leaves of the paper cemented together and to the cover, and that in use thereof by the smoker the leaves are separately torn from the book used in the manufacture of cigarettes by the smoker, and when the leaves are all expended the cover is thrown away as useless; that the function of the cover is
32 simply to protect the leaves from becoming scattered or injured by being handled or carried in the pockets of the smokers and had or have no other function or use; and thereupon rested his case.

The defendant, to sustain the issues on his part, produced as a witness one Harris, who was connected in some way with the office of the appraisers in the custom-house at New Orleans and called on him to produce some packages of cigarette paper of another kind than the said goods imported, and, as the plaintiff contended, of a thicker and stiffer structure and body, some of the paper being known as Spanish cigarette paper, some of the paper produced being cut from coarse straw paper, of the character of straw paper—sometimes used as wrapping paper—the packages produced being without

covers and held in place as packages by a flexible band around the paper, the witness stating that he had bought the paper produced in a cigar store or stores in the city of New Orleans in order to be able to testify about the same in this case, stating that he had been a cigarette smoker, making his own cigarettes for a number of years, rolling and making the cigarettes by combining the tobacco and paper himself; whereupon the attorney for the defendant propounded to said witness the following question:

Question. Can the cigarette-paper packages testified by you to have been purchased by you at the retail stores in this city be used by consumers and smokers in the condition in which these packages have been produced to the jury?

To this question the counsel for the plaintiff objected
33 that the question sought to elicit evidence immaterial and foreign to any legitimate issue in this case; that the classification of the goods in question in this case was a classification that attached to the goods at the moment of entry, and was not affected nor could the classification be controlled by any possible use or condition of the goods brought about after entry and after the duty was paid and the goods have passed into the commerce of the country; that if any further use to be made of the goods is to revert back to affect the condition, status, or classification of the goods at the moment of entry so as to make the goods have a classification or description different from their condition at the moment of entry, then the undisputed use of the goods shown to have actually taken place or occurring, to wit, either sold, as imported, to cigarette factories for use in making cigarettes for sale, — a part compiled, manufactured, and pasted together and into covers so as to make cigarettes books, ought to control or affect the classification of the goods at the moment of entry; that as the goods were imported, and in the form imported, the only parts that went into the smoker's use direct were not in that completed state of manufacture in which they could be classed as an "article" of commerce ready to be put upon the market for sale for consumption; that further manufacture, manipulation, and expense was necessary, and not only necessary, but actually incurred in manufacturing or making the material as imported into completed articles of any kind, and that the use could not be controlled for the purpose of definition or classification by any hypothetical, contingent, or conjectural use that might be
34 made of the material as imported after importation; and, further, that under the law it was and is immaterial what use was ultimately made of the articles, the same being provided for under Schedule "M" as manufactures of paper.

The witness was allowed to testify, subject *subject* to the judgment of the court, as to the admissibility of the evidence, and in answer to the interrogatory answered, "Yes," and under the same objection testified that it was possible to use the paper in controversy in this case in the form in which it was imported without pasting together the edge or pasting or gluing the paper to connect the cover to make a cigarette book, as the plaintiff had done.

Before the case was submitted to the jury and before they re-

tired to consider the same the counsel for the plaintiff moved the court to sustain the objection to this evidence and withdraw the said testimony from the consideration of the jury; this the court refused to do; to which ruling and decision the said plaintiff, by his said counsel, did then and there except.

That after the evidence had been concluded the plaintiff, through his counsel, asked the court to instruct and give to the jury in charge the following instructions:

First. "Customs dues on imported merchandise depend upon the action of Congress and can only be imposed under the authority of an act of Congress that in terms declares the rate of duty imposed on the article of importation in the form and condition in which it is found at the moment of importation for consumption, and where the question of what duty was intended to be imposed
35 is one of doubt the doubt is to be resolved in favor of the importer, as duties are never imposed on the citizen upon vague and doubtful interpretations. 121 U. S., page 616.

This charge the court then and there refused to give in manner and form as the same was requested, making the following statement to the jury in respect thereof:

"Refused, except with the following qualification, and with that given, except when, as in this case, whatever doubt there is arises from different classifications of the same article (in case the jury find the articles imported are both made of paper and smokers' articles); in such a case the statute declares that the article must pay the highest rate of duty; and if the jury find that the articles imported are smokers' articles they should be assessed at the rate of 70 per cent., although they are also made of paper.

The substance of the charge is that if there is a doubt as to whether the article imported is subject to a duty the doubt should be resolved in favor of the importer, unless a doubt comes from your clearly finding that the article under a different classification might be subject to two or more rates of duty, in which case you would assess it at that rate of duty which was highest."

To the refusal of the court to give the charge as requested and to the modification and qualification thereof by the court and to the giving the instruction to the jury as qualified the said plaintiff, by his said counsel, then and there excepted.

36 Second. A manufacturer has the right to manufacture or make his goods as he pleases, and in determining in what form or state of manufacture he will import his goods into the United States he may take into consideration the tariff laws of the United States and so prepare his goods as to get the benefit of lower rate of duty if he makes no fraudulent representation or concealment of the true condition or character of the goods at the time of importation and payment of duty."

The court refused to give this instruction to the jury as requested, but gave the same to the jury with the following limitation and qualification:

"Given, the limitation would be where the thing was ready for use, but was attempted to be made to appear to be not so ready.

I do not mean to say that this is this case; it is for you to say; but there would be the limitation."

To the refusal of the court to give said second charge as requested and to the limitation and qualification of said instruction by the court the said plaintiff, by his said counsel, then and there also excepted.

Third. If the customs duty — on any article of manufacture imported, made up of a combination of various elements or materials combined in manufacture to make a single article of manufacture or merchandise that is by Congress placed higher in rate of duty than the aggregate duties upon all the elements or material- combined to make that article, the importer has lawful right to
37 import the several component parts of the combination, separately, at the lower rate of duty imposed on the separate elements and combine them into the manufactured article after importation into this country.

This instruction the court refused to give to the jury in the form as requested, but gave in charge to the jury in connection with that the following:

"Unless the jury find the elements imported separately are really parts of and not materials for a whole article."

To the refusal of the court to give said charge as requested and to the matters given in charge to the jury in connection therewith, as above set forth, the said plaintiff, by his said counsel, then and there also excepted.

Fourth. By the documentary evidence in this case it appears that the importation of "covers" was a separate or single importation of covers of the description given in evidence before you, and that at the time of importation and withdrawal for consumption the covers were uncombined with any other article or material, and if the covers are admitted to be a manufacture "of which paper is a component material" the covers as imported are described and enumerated in "Schedule M" of the tariff act of March 3, 1883, and could be lawfully charged with duty only at the rate of 15 per centum ad valorem, and the 70 per cent. ad valorem assessed and collected by the defendant was fifty-five per cent. in excess of the lawful duty on the covers.

This instruction the court also refused to give in manner
38 as requested, but stated to the jury in connection therewith:

"Given, with the qualification attached to the last instruction" (meaning thereby instruction 3).

"I have explained that in another charge, which perhaps I ought to say here. What I mean by that is, if there is no process left except the mere laying together, then they are parts of the whole; if there are any processes either of manufacture or combination beyond the laying together, then they are materials and not parts."

To the refusal of the court to give said instruction as requested and to the statements and charge given to the jury in connection therewith, as above set forth, the said plaintiff, by his said counsel, then and there excepted.

Fifth. If the jury find from the evidence that the cigarette paper

as imported in this case was originally manufactured in large sheets, and before importation was by mechanical means cut into the small subdivisions or parts as shown in the sample produced in evidence by the defendant as a part of the process of manufacturing such large sheets of paper into books of cigarette paper, and that it was but a portion of the real process of manufacture of the completed book, as known in the commerce of this country as cigarette books, and that in order to complete the article for sale in this country as a smoker's article it was necessary to paste or glue the separate cut papers into parcels of leaves and paste or glue them to a stiff protection cover in the form of a book, then
39 and in that case the said paper in the form in which it was imported was not at the time of importation a smoker's article, but simply one element, which by future manipulation and further manufacture and combination in this country would become a smoker's article by home manufacture, but was and is a manufacture of paper provided for in "Schedule M" of the customs act of March 3, 1883, and subject to only 15 per cent. duty ad valorem instead of the seventy-five per cent. exacted by the defendant.

This charge the court gave, but with the summary as follows:

"I think that instruction is correct. I give you that. If you find that this cut paper was introduced and it could not be used without being combined with glue and attached to some stiff cover, then it would be true that it was the material for a smoker's article and not a part of a smoker's article. That is a question of fact. The district attorney has asked me to give instructions on that point which will bring the converse of the proposition up before you (referring to defendant's requests for instructions).

5th. Thereby giving the instruction asked, but adding as a practical interpretation of it that portion subjoined by the court and not refusing or qualifying unless the subjoined interpretation produced that effect.

To which said refusal of the court to give said charge in manner and form as requested, as well as to his said qualification and charge to the jury in connection therewith, as above set forth, the said plaintiff, by his said counsel, then and there excepted.

Sixth. In determining whether any article or material in
40 the language of the paragraph of "Schedule N" of the customs act of March 3, 1883, relating to smoker's articles has been in the same act "specially enumerated or provided for," "It is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles." Arthur *vs.* Butterfield, 125 U. S., 70–76. "Paper manufactures of or of which paper is a component material, as contained in 'Schedule M' of the customs act of 1883, is a sufficient designation to render the goods 'enumerated articles' under the statute and to take them out of the simulated clauses." 125 U. S., 76; 96 U. S., 128.

This instruction the court also refused to give, stating to the jury in connection therewith as follows:

"I refuse that, because they must not only be enumerated, but

they must be specially enumerated. It is not enough that they fall under some general provision; there must be a specific designation of them in the statute."

To this refusal of the court to give the said charge as requested and to the charge given by the court in connection therewith as above set forth the said plaintiff, by his said counsel, then and there also excepted.

Seventh. The defendant exacted duties on the importation involved in this suit under supposed authority of a subdivision of "Schedule N" of the act of 1883, which reads: "Pipes, pipe bowls,
and all smoker's articles not specifically enumerated or pro-
41 vided for in this act, seventy per centum ad valorem; all
common pipes of clay, thirty-five per centum ad valorem."

The "smoker's articles" designated in this clause are, first, articles imported into this country in a state of completed manufacture in a condition in the form as imported to go into the commerce of this country and into the hands of consumers as a completed smoker's article without the necessity of any further process of completion or manufacture before sale or regular consumption and so known and recognized in the markets and commerce of this country.

Second. To subject any article of importation to the operation of this clause of "Schedule N" the article must not be covered or provided for by any other provision of the same tariff act, the intention of Congress being only to cover by this paragraph and seventy per centum duty such articles as had not been otherwise provided for. If the small cut sheets of paper involved in this suit are provided for in "Schedule M" of the same tariff act, then the seventy per centum clause of "Schedule N" does not apply to the importation in question.

This instruction the court also refused to give in the form as requested, and in connection therewith gave in charge to the jury the following:

"Subdivision I I give, with this definition of the word "process" (beyond that of simply placing or laying together as parts of a whole). Subdivision 2 I refuse.

To the refusal of the court to give said instruction and both
42 subdivisions thereof as requested, and to the modification of
subdivision I, and to the refusal to give subdivision 2 in
charge to the jury the said plaintiff, by his said counsel, then and there excepted.

Eighth. If the jury find from the evidence that the small sheets of paper, invoiced and entered in the custom-house as cigarette paper, are manufacturers of paper or manufacturers "of which paper is a component material not specially enumerated or provided for in this act" (to wit, the customs revenue act of March 3, 1883), then and in that case the goods were subject to only 15 per centum ad valorem duty as a manufacture of paper or of which paper is a component part, and it is immaterial whether the article was to be used in the manufacture of cigarettes or not.

This instruction the court refused to give in form as requested,

but in connection therewith gave in charge to the jury the following:

"If the jury find the things were smokers' articles, then this instruction would not be the law; if they find the things were not smokers' articles, then this instruction would be the law."

To the refusal of the court to give said instruction as requested and to said charge to the jury in connection therewith as above set forth the said plaintiff, by his counsel, then and there excepted.

Ninth. If the jury find from the evidence that the "covers" imported and in question in this case were manufactured of paper, or that paper was a component part of the manufacture as material,

then the covers were and are subject to only 15 per centum
43 ad valorem duty, and it is immaterial to what use the covers
were to be devoted or for what they were to be used after importation and when they became a part of the merchandise of this country.

This instruction the court refused to give, but gave to the jury in charge in connection therewith the following charge and instruction:

"Given, unless the jury find the covers were fitted and adapted to be used by smokers in connection with the cigarette paper, and were ready to be so used without any process excepting laying together, and were imported to be so used, but as a separate importation, merely to avoid the higher duty on smokers' articles."

To which refusal of the court to give said instruction as requested and to the modification and matters given in the charge to the jury in connection therewith, as above set forth, the said plaintiff, by his said counsel, then and there also excepted.

That the said defendant, by his counsel, requested the court to give the jury in charge the following:

Fourth. It is the law that all smokers' articles whatsoever are dutiable at 70 per cent. ad valorem, whatever be the material or substance of which they may be made, except such smokers' articles as are specially enumerated or provided for in the tariff.

The court gave the jury in charge said instruction; to which the said plaintiff, by his counsel, then and there excepted.

Fifth. If the jury find that the covers in this case can be
44 used by smokers for the purpose for which such covers are
used by smokers without further process of manufacture, and if the jury find that the leaves of cigarette paper in this case can also be used by smokers for the purpose for which such leaves are used by smokers without further process of manufacture, then the jury should find for the defendant.

The court gave said charge as requested to the jury with the following addenda or change:

"Without process of combination, excepting simply laying one inside the other."

To which said instruction and ruling of the court in giving said matter in charge to the jury the said plaintiff, by his said counsel, also then and there excepted.

Sixth. If the jury find that the smoker himself, by simply placing

the package of small leaves of cigarette paper within the cover and placing the rubber band which adheres to the cover around the cover and the package of small leaves of cigarette paper, can use the book of cigarette paper for all the purposes to which a book of cigarette paper is put by smokers, then the jury should find for defendant.

Which said instructions so requested by said defendant the said court gave in charge to the jury; to which ruling and decision and charge as given the said plaintiff, by his said counsel, then and there also excepted.

Eighth. It is a question of fact for the jury whether the
45 covers in this case are smokers' articles, and also whether the small leaves of cigarette paper in this cause are smokers' articles.

Which said instruction as requested by the said defendant was in that form given to the jury by the court.

To which said instruction and decision of the court giving the said instruction the said plaintiff, by his said counsel, then and there also excepted.

That the said defendant also requested the court to give the jury in charge the following matter:

Ninth. The word "article," as used in tariff acts, is not to be restricted to articles put in a condition for final use, but is used in a broad sense and covers equally things manufactured and things partially manufactured. This instruction was refused.

The court, considering this request, gave to the jury in charge the following statement:

"I propose to give the definition of the article in my own way. I do not state that it is not law, but in its application to this case it is the duty of the court to define the article in its own way, and I will do it."

Then the court said: There are several propositions of law which it is my duty to lay down to you, and then the whole subject becomes a question of fact. Of course, in the passing of the tariff act the Congress of the United States has to deal with such a large number of articles that have to be considered in so many aspects that it is a matter of great difficulty to find out how far the meaning
46 of the words is either for the court or jury where they come to consider them, and therefore it is a matter of close observation only that will enable you to take this case and apply the law as the court gives it to you.

The first question of fact substantially before you is whether these two articles, the covers as one, and the cigarette paper as the other, shall be subjected to a duty of 70 per cent. or should be subjected to a duty of 15 per cent. I understand that to be the question, and that involves, in the first place, the question as to whether these articles, clearly included in one schedule as articles that are wholly or in part made of paper, are not also included in another schedule as smokers' articles and are not still to have the duty assessed upon them as smokers' articles, and the court instructs you that if you find them to be smokers' articles they are to be assessed as smokers' articles. That is a conclusion of law. The fact that they would be

included under another designation or classification if viewed from a different standpoint, namely, from a consideration of what use they are to be put to, but not of what they are manufactured, would call — further application of the special provision of the statute, which says that where an article might be subject to more than one rate of duty that rate of duty should be applied to it which is the highest.

To which said ruling and decision of the court, and to the giving of said matter in charge to the jury as aforesaid the said plaintiff, by his counsel, then and there excepted.

And the court, proceeding further, gave in charge to the
47 jury the following, to wit:

"Then the only question which the court is called upon to respond to is, what constitutes a smoker's article, and the court instructs you that a smoker's article is such an article as a smoker would ordinarily and distinctively use in or in connection with smoking. I cannot express it to you any more simply than that you determine exactly what is a smoker's article as you would what is a fisherman's article. A fisherman, when he goes to fish, has to have certain things to prosecute his sport with. It would be for you to say whether such and such a thing is a fisherman's article; so a smoker, when the statute uses the term with reference to him. It is for you to say whether these are such things that in their present state—in the state in which they are imported—are articles that would be used by a smoker ordinarily and distinctively."

To which said ruling and decision of the court and to the giving of said matters in charge to the jury the said plaintiff, by his said counsel, then and there also excepted.

The court then proceeded to charge the jury further as follows:

First. The expression "not specially enumerated or provided for" means not otherwise designated by a specific designation. Arthur *vs.* Butterfield—distinguished.

To which said ruling and the giving of the said instruction and charge to the jury the said plaintiff, by his said counsel, then and there excepted.

Second. If the jury find the things in question are made
48 wholly or in part of paper, and also are smokers' articles (articles ordinarily and distinctively used by smokers or in connection with smoking), then they are twice designated in the statute under two different classifications, and under the provision of the statute must pay the higher rate of duty—that is, 70 per cent.

To which said ruling, decision, and instruction of the court to the jury the said plaintiff, by his said counsel, also then and there excepted.

Third. To find that the things imported are smokers' articles the jury must find that they are ordinarily and distinctively used by smokers in or in connection with smoking and that they are ready to be so used."

To which said ruling and decision of the court, as controlled, affected, or given meaning by the other instructions by said court and given to the jury, the said plaintiff, by his said counsel, also then

and there excepted, claiming that the said instruction, when taken in connection with the charge to the jury relating to the definition of smokers' articles and the question whether all smokers' articles are subjected by law to 70 per cent. ad valorem duty, was not a correct and proper instruction and tended to mislead the jury.

Fourth. If the jury find they are such things as, when combined with other things, make smokers' articles, but are not used by smokers until so combined by some process beyond merely laying the things together, then under the statute they are the materials for smokers' articles, but not smokers' articles.

The converse of the propostion would be true, that if they
49 were used by smokers when they were merely put together without any process of manufacture or construction, then they would be smokers' articles, leaving it to you, as a question of fact, whether there was in this case the mere putting of the two things together without any other process. If the merely laying them together enables the smoker to use them, and he did use them without any process except that of laying them together, they would be smokers' articles; but if, on the other hand, there was a process of manufacture or combination beyond laying together, then they would be materials for smokers' articles and not smokers' articles."

To which said ruling and matters given in charge to the jury, in form as the same were so given to the jury as above set forth, the said plaintiff, by his said counsel, also then and there excepted, for the reason, among others, that if such articles of importation were articles of manufacture or of which paper is a component material, and duty therefor is provided under "Schedule M," that it is immaterial whether said articles are smokers' articles or the material for smokers' articles, the same being provided for under "Schedule M," whatever may have been their destination after importation.

Fifth. If the jury find that the things separately imported are imported separately as matter of business and not as an evasive device, then they are the materials for the articles, but not the articles themselves; but if the jury find the things, though imported separately, were designed, without any expenditure beyond being put together, to be put and sold together, and were imported sep-
50 arately merely to escape a higher rate of duty and not from motives of business, then the separate things are to be classed as parts of a whole and not simply as materials."

To which said ruling and decision and to the giving of the said matters as aforesaid in charge to the jury as instruction the said plaintiff, by his said counsel, also then and there excepted.

And, as to and concerning all of the matters and exceptions herein set forth and contained in this his bill of exceptions in that behalf, then and there tendered the same, as hereinabove set forth, to the court as his bill of exceptions in respect to all of said matters, and prayed that the same might be duly signed, filed, and made part of the record herein, and it was done accordingly.

(Signed) EDWARD C. BILLINGS, *Judge.*

Sample of paper marked Exhibit "A," referred to in bill of exceptions, attached to this transcript.

Covers marked sample "B," referred to in bill of exceptions, attached to this transcript.

51 *Judgment.*

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, April Term, 1889.

NEW ORLEANS, FRIDAY, *April 12th*, 1889.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

HERMANN ISAACS
vs.
B. F. JONAS, Collector, etc. } No. 11,182.

By reason of the verdict of the jury herein and in accordance therewith it is ordered, adjudged, and decreed that there be judgment in favor of the defendant, B. F. Jonas, collector of customs for the port of New Orleans and of the collection district to which said port belongs, and against the demand of the plaintiff, Hermann Isaacs, with costs.

Judgment rendered April 12, 1889.

Judgment signed May 10, 1889.

(Signed) EDWARD C. BILLINGS, *Judge.*

52 *Assignment of Errors. Filed May* 17, 1889.

Circuit Court of the United States, Eastern District of Louisiana.

HERMAN ISAACS
vs.
THE UNITED STATES. } No. 11,182.

And now comes Hermann Isaacs, plaintiff in error, and assigns as error:

1st.

That the court erred in not withdrawing from the jury the evidence taken under objection, as shown in the bill of exceptions in the record.

2.

The court erred in its construction of the customs laws of the United States as set forth and excepted to in said bill of exceptions.

3. The court erred in refusing to give to the jury in charge the matters in form as prayed for by plaintiff as set forth and excepted to in said bill of exceptions.

4th. The court erred in its charge to the jury as shown and set

forth and excepted to in said bill of exceptions and as to each of said charges as excepted to.

5. The court erred in giving to the jury the several charges asked by the United States and in all modifications thereof as shown by said bill of exceptions.

6th. The court erred in the charge as given to the jury on its own motion as shown and excepted to in bill of exceptions of record in this case.

(Signed) J. R. BECKWITH,
Att'y for Plaintiff in Error.

53 Know all men by these presents that we, Hermann Isaacs, as principal, and Albert M. Silbernagel, as surety, are held and firmly bound unto Benjamin F. Jonas, collector of the port of New Orleans, La., in the full and just sum of five hundred dollars, to be paid to the said Benjamin F. Jonas, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a circuit — of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Hermann Isaacs is plaintiff and Benjamin F. Jonas is defendant, judgment was rendered against the said Hermann Isaacs, plaintiff, and the said Hermann Isaacs having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said B. F. Jonas, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Hermann Isaacs shall prosecute his writ to effect and answer all damages and costs if he fail to make — plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) HERMANN ISAACS, [L. S.]
By J. R. BECKWITH, *Att'y.* [L. S.]
(Signed) ALBERT M. SILBERNAGEL. [L. S.]

Sealed and delivered in presence of—
(Signed) ABEL J. DREYFOUS.

Citation waived May 17th, 1889.
(Signed) CH'S PARLANGE, *U. S. Att'y.*

Bond approved May 18, 1889.
(Signed) EDWARD C. BILLINGS, *Judge.*

54 [Endorsed:] No. —. United States circuit court, eastern district of Louisiana. —— *vs.* ——. Bond for writ of error. Filed May 17, 1889. —— ——, clerk.

UNITED STATES OF AMERICA, *Eastern District of Louisiana,* } *ss:*

Personally appeared Albert M. Silbernagel, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, Louisiana, and is worth the full sum of five hundred dollars over and above all his debts and liabilities and property exempt from execution.

(Signed) ALBERT M. SILBERNAGEL.

Subscribed and sworn before me this 19 day of May, 1889.

(Signed) ABEL J. DREYFOUS,

[SEAL.] *Notary Public.*

55 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 54 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Hermann Isaacs *vs.* B. F. Jonas, collector, etc., No. 11182 of the docket of the said court, and that the Exhibits A & B annexed to this transcript are the exhibits referred to and made part of the bill of exceptions.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness my hand and the seal of said court, at the city of New Orleans, this 14 day of September, A. D. 1889.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 14 day of September, A. D. 1889.

EDWARD C. BILLINGS, *Judge.*

56 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you

or some of you, between Hermann Isaacs, pl'ntiff, and Benjamin F. Jonas, collector of the port of New Orleans, Louisiana, defendant, No. 11182 of the docket of said circuit court, a manifest error hath happened, to the great damage of the said Hermann Isaacs, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 16 day of May, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

[Endorsed:] United States circuit court. No. 11182. Hermann Isaacs *versus* B. F. Jonas, collector, &c. Writ of error. No. —. U. S. circuit court, eastern district of Louisiana. Filed May 16, 1889. E. R. Hunt, clerk.

Endorsed on cover: Case No. 13,723. E. Louisiana C. C. U. S. No. 142. Hermann Isaacs, plaintiff in error, *vs.* Benjamin F. Jonas, collector of the port of New Orleans, Louisiana. Filed October 10, 1889.

OCTOBER TERM, 1888.

HERMANN ISAAC,
Plaintiff in Error,
vs.
No. 1,088.
SHEPARD H. FINNEY, Collector of the Port of New Orleans, La.,
Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF FOR PLAINTIFF IN ERROR.

CHARLES CURIE,
D. EVES MACKIE,
Attorneys for Plaintiff in Error.

W. WICKHAM SMITH,
Of Counsel.

Supreme Court of the United States.

HERMANN ISAAC,
Plaintiff in Error,

vs.

BENJAMIN F. JONAS, Collector of the Port of New Orleans, Louisiana,
Defendant in Error.

This is an appeal from a judgment of the Circuit Court of the United States for the Eastern District of Louisiana, entered upon the verdict of a jury in a suit brought by the plaintiff in error, an importer, against the defendant in error, as Collector of the Port of New Orleans, to recover moneys claimed to have been illegally exacted as duties on merchandise imported by the plaintiff in error.

Statement of Facts.

In August, 1885, the plaintiff in error made two importations of manufactures of paper—one of cut cigarette paper, at the Port of New Orleans, and the other of covers for cigarette books at New York, but transferred to New Orleans in bond (fols. 1 and 3). Entries were made upon both, and duty paid at the Port of New Orleans (fols. 26 and 27).

The cigarette paper was cut into small pieces of the size proper for making cigarettes, and was put up in

packages wrapped in paper—the packages being about six or eight inches square. These packages were again enclosed in large cases or boxes for sea transportation. The contents of each of the smaller packages referred to were small pieces of paper, cut to the size proper and of the proper character of paper for making cigarettes. The paper as imported was in no manner attached together in any form of binding, but was separated into divisions of about two hundred and fifty pieces of paper by the interposition of a piece of paper of a different color cut of the same size, so that it subdivided the paper into divisions of the proper size and number of leaves for the contents of the book of leaves of cigarette paper of the ordinary size of such books as sold in the market (fol. 25). The paper of which the small cut papers were made was made of a peculiar material and by a process fitting it to be used as wrappers for cigarettes. It was manufactured in large sheets, and afterwards cut into the form of smaller pieces as imported, before importation, by machines contrived for that purpose, and was so cut to adapt it to use as wrappers for cigarettes. It was the intention of plaintiff at the time of importation, and his motive in making the importation, to manufacture the paper into what are known as cigarette books. The process of such manufacture is to separate the paper as imported where the colored leaves or subdivisions are located in the paper as imported, and with a brush cover one edge of the paper with flour paste, glue or some adhesive cement adapted to cement leaves together at one edge, and then cement the paper into the covers as imported. As to and concerning this particular importation, a large portion thereof was so cemented and put up into books by the plaintiff after the same came into his possession by withdrawal and payment of duties. This was done at the expense of about four hundred dollars for hire of workmen to do the work. A portion of the paper as

imported was sold directly to manufacturers of cigarettes, to be used in their factories in making cigarettes for sale as a manufacture and article of commerce. As to this particular kind of manufacture, the plaintiff was the sole importer thereof into the United States by special arrangement with the manufacturers thereof. As an article of retail sale, or jobbing and sale to the retail dealers, the paper has always been sold in this country in the form of books consisting of a certain number of leaves of the paper cemented together and to the cover, and in use thereof by the smoker, the leaves are separately torn from the book, used in the manufacture of cigarettes by the smoker, and when the leaves are all expended the cover is thrown away as useless (fols. 30, 31).

As to the covers (which were imported by a separate vessel, and at a different port, fol. 27), their function was simply to protect the leaves of paper cemented into them, as above described, from becoming scattered or injured by being handled or carried in the pockets of smokers, and they had and have no other function or use (fols. 31 and 32).

Upon all of this merchandise the Collector of the Port of New Orleans levied and collected a duty of 70% *ad valorem*, under the provisions of paragraph 476, Schedule N, Act of March 3d, 1883 (22 U. S. Stat. at Large, p. 488), for "pipes, pipe-bowls, and all smokers articles' whatsoever, not specially enumerated or provided for in this Act" (fol. 28).

Against this classification plaintiff in error duly protested, claiming that this merchandise was dutiable at only 15% *ad valorem*, under the provision of paragraph 388, Schedule M, of the Act of March 3d, 1883, for "paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for" (fols. 27, 28).

Appeals were duly taken to the Secretary of the Treasury, as required by Section 2931, Revised Stat-

utes, from the decision of the Collector as to the rate and amount of duty chargeable upon this merchandise, and the Secretary having sustained the decision of the Collector, this suit was brought in the manner and within the time prescribed by law, and it was conceded upon the trial that if the plaintiff was entitled to recover anything, he was entitled to recover the sums named and set forth in the prayer of his petition (fol. 29).

The case was tried before a Court and jury, and the jury rendered a verdict in favor of the defendant (fol. 23).

A reversal of the judgment is asked by reason of errors of law on the part of the Court in the admission of evidence, in specified portions of its charge to the jury, and in its refusals to charge specified propositions submitted to it, or charging them with erroneous qualifications and modifications which were prejudicial to the plaintiff in error.

Specification of Errors.

1st. It was error for the Court to admit, against the objection of the plaintiff in error, a question addressed to a witness called on behalf of the defendant in error—whether certain cigarette paper purchased by said witness in cigar stores in the City of New Orleans, and which was of a different kind and character from that imported by plaintiff in error, *could be* used by consumers and smokers in the condition in which the witness had purchased it (without covers) (fols. 32 and 33).

2d. It was error for the Court to refuse on motion to withdraw such testimony from the consideration of the jury (fol. 34).

3d. It was error for the Court to permit the same witness against objection to testify that it was *possible*

to use the paper in controversy in the case in the form in which it was imported without pasting together the edge, or pasting or gluing the paper to connect the cover, to make a cigarette book as the plaintiff had done (fol. 34).

4th. It was error for the Court on motion to refuse to withdraw such testimony from the consideration of the jury (fol. 34).

5th. It was error for the Court, on the request of plaintiff in error to charge the following proposition:

"A manufacturer has the right to manufacture or make his goods as he pleases, and in determining in what form or state of manufacture he will import his goods into the United States, he may take into consideration the tariff laws of the United States, and so prepare his goods as to get the benefit of lower rate of duty, if he makes no fraudulent representation or concealment of the true condition or character of the goods at the time of importation and payment of duty," to refuse to charge the same except with the following limitation:

"Given, the limitation would be where the thing was ready for use, but was attempted to be made to appear to be not so ready. I do not mean to say that this is the case; it is for you to say; but there would be the limitation."

6th. It was error for the Court, on the request of plaintiff in error to charge the following proposition:

"If the customs duty—on any article of manufacture imported, made up of a combination of various elements or materials combined in manufacture to make a single article of manufacture or merchandise that is by Congress placed higher in rate of duty than the aggregate duties upon all the elements or material—combined to make that article, the importer has lawful

right to import the several component parts of the combination, separately, at the lower rate of duty imposed on the separate elements, and combine them into the manufactured article after importation into this country,"

to refuse to charge the same, except with the following limitation:

"Unless the jury find the elements imported separately are really parts of and not materials for a whole article."

7th. It was error for the Court, on the request of counsel for plaintiff in error to charge the following proposition:

"By the documentary evidence in this case it appears that the importation of 'covers' was a separate or single importation of covers of the description given in evidence before you, and that at the time of importation and withdrawal for consumption the covers were uncombined with any other article or material, and if the covers are admitted to be a manufacture 'of which paper is a component material,' the covers as imported are described and enumerated in Schedule M of the Tariff Act of March 3, 1883, and could be lawfully charged with duty only at the rate of 15 per centum *ad valorem* and the 70 per cent. *ad valorem* assessed and collected by the defendant was fifty-five per cent. in excess of the lawful duty on the covers.".

to refuse to charge the same except with the following qualification:

"Given, with the qualification attached to the last instruction" (meaning thereby the qualification referred to in 6th specification of error).

"I have explained that in another charge, which perhaps I ought to say here. What I mean by that is, if there is no process left except the mere laying together, then they are parts of the whole; if there are

any processes either of manufacture or combination beyond the laying together, then they are materials and not parts."

8th. It was error for the Court, on the request of counsel for plaintiff in error to charge the following proposition:

"If the jury find from the evidence that the cigarette paper as imported in this case was originally manufactured in large sheets, and before importation was by mechanical means cut into the small subdivisions or parts as shown in the sample produced in evidence by the defendant as a part of the process of manufacturing such large sheets of paper into books of cigarette paper, and that it was but a portion of the real process of manufacture of the completed book, as known in the commerce of this country as cigarette books, and that, in order to complete the article for sale in this country as a smoker's article, it was necessary to paste or glue the separate cut papers into parcels of leaves, and paste or glue them to a stiff protection cover in the form of a book, then and in that case the said paper, in the form in which it was imported, was not, at the time of importation, a smoker's article, but simply one element, which, by future manipulation and further manufacture and combination in this country, would become a smoker's article by home manufacture, but was and is a manufacture of paper provided for in "Schedule M" of the Customs Act of March 3, 1883, and subject to only 15 per cent. duty *ad valorem* instead of the 75 per cent. exacted by the defendant"—

to refuse to charge the same, except with the following qualification:

"If you find that this cut paper was introduced, and it could not be used without being combined with glue and attached to some stiff cover, then it would be true

that it was the material for a smoker's article, and not a part of a smoker's article. This is a question of fact."

9th. It was error for the Court, on the request of counsel for plaintiff in error to charge the following proposition :

" The ' smokers' articles ' designated in this clause are : First, articles imported into this country in a state of completed manufacture in a condition in the form as imported to go into the commerce of this country and into the hands of consumers as a completed smoker's article without the necessity of any further process of completion or manufacture before sale or regular consumption, and so known and recognized in the markets and commerce of this country."

to refuse to charge the same except with the following qualification :

" (beyond that of simply placing or laying together as parts of a whole)."

10th. It was error for the Court, on the request of counsel for the plaintiff in error to charge the following proposition :

" If the jury find from the evidence that the ' covers ' imported and in question in this case were manufactured of paper, or that paper was a component part of the manufacture as material, then the covers were and are subject to only 15 per centum *ad valorem* duty, and it is immaterial to what use the covers were to be devoted or for what they were to be used after importation and when they became a part of the merchandise of this country."

to refuse to charge the same except with the following qualification :

" Given, unless the jury find the covers were fitted and adapted to be used by smokers in connection with the cigarette paper, and were ready to be so used

without any process excepting laying together, and were imported to be so used, but as a separate importation, merely to avoid the higher duty on smokers' articles."

11th. It was error for the Court to charge the following proposition :

"If the jury find that the covers in this case can be used by smokers for the purpose for which such covers are used by smokers without further process of manufacture, and if the jury find that the leaves of cigarette paper in this case can also be used by smokers for the purpose for which such leaves are used by smokers without process of combination, except simply laying one inside the other, then the jury should find for the defendant."

12th. It was error for the Court to charge the following proposition :

"If the jury find that the smoker himself, by simply placing the package of small leaves of cigarette paper within the cover and placing the rubber band which adheres to the cover around the cover and the package of small leaves of cigarette paper, can use the book of cigarette paper for all the purposes to which a book of cigarette paper is put by smokers, then the jury should find for the defendant."

13th. It was error for the Court to charge the jury the following proposition :

"If the jury find they are such things as, when combined with other things, make smokers' articles, but are not used by smokers until so combined by some process beyond merely laying the things together, then, under the statute, they are the materials for smokers' articles, but not smokers' articles.

The converse of the proposition would be true, that if they were used by smokers when they were merely

put together without any process of manufacture or construction, then they would be smokers' articles, leaving it to you, as a question of fact, whether there was in this case the mere putting of the two things together without any other process. If the merely laying them together enables the smoker to use them, and he did use them without any process, except that of laying them together, they would be smokers' articles; but if, on the other hand, there was a process of manufacture or combination beyond laying together, then they would be materials for smokers' articles, and not smokers' articles."

14th. It was error for the Court to charge the following proposition:

"If the jury find that the things separately imported are imported separately as matter of business and not as an evasive device, then they are the materials for the articles, but not the articles themselves; but if the jury find the things, though imported separately, were designed without any expenditure beyond being put together, to be put and sold together, and were imported separately merely to escape a higher rate of duty, and not from motives of business, then the separate things are to be classed as parts of a whole, and not simply as materials."

POINTS.

I.

Evidence of the use or adaptation to use of a variety of cigarette paper not imported by the plaintiff in error was incompetent and immaterial.

The question to be determined in the case was whether the article imported by plaintiff in error, in the condition in which he imported it, was a smoker's article within the meaning of that term as used in the tariff law. If it, by reason of its size, its thinness, or any of its other properties, was not adapted for practical use as a smoker's article in the condition in which it was imported, it was wholly immaterial whether some other and different paper might be used as, or was in fact, a smoker's article. The Government had claimed and was claiming that the article imported was in fact a smoker's article. The claim was not that it was dutiable as a smokers' article by similitude. Nor could such a claim have been sustained, if made, for the phrase "manufactures of paper" was a sufficient enumeration to take the article out of the operation of the similitude clause (Section 2499, Revised Statutes, as amended by the Act of March 3, 1883). This was expressly held by this Court in the case of Butterfield vs. Arthur's Executors, 125 U. S., 70.

How could the fact that some other article was or might be a smoker's article tend to prove that the article in controversy was a smoker's article; yet a witness was allowed to testify, against objection (fol. 32), that Spanish cigarette paper and coarse-straw paper (sometimes used as wrapping paper), samples of which, without covers, in packages held in place by an elastic band were produced by him, *could be used* by smokers

in the condition in which those samples were produced to the jury. This testimony was calculated to, and probably did, mislead and prejudice the jury ; and, we submit, it was wholly incompetent and immaterial. Even if comparison could properly have been resorted to at all, it would have been necessary to compare the article in controversy to an article of the same character, and not to one *which differed from it in the very properties that would determine whether or not it was fit for use as a smoker's article*, viz., thickness and stiffness.

Hermann vs. Arthur's Executors, 127 U. S., 363.

In that case it was held error, for the purpose of establishing a similitude, to compare cheap calf-hair goods with costly mohair goods.

II.

It was error to admit testimony, and particularly opinion testimony, as to a POSSIBLE use that MIGHT BE made of the article imported by plaintiff in error.

At folio 34 it appears that the Government witness testified, under objection, that "it was possible to use the paper in controversy in this case in the form in which it was imported without pasting together the edge, or pasting or gluing the cover to connect the cover to make a cigarette book, as the plaintiff had done.

This testimony was doubly objectionable. In the first place, it was purely speculative and opinionative. The witness did not assume to testify that he had ever used the paper in controversy in the manner described

himself, or that he had ever seen anybody else do so, or had ever heard of any one else doing so. He was allowed to testify that it could be done. This was a pure guess on his part, and there was no reason why the Court should have permitted his guesses to be put before the jury as evidence. They were presumably competent to do their own guessing.

But, even if this testimony had been as to fact instead of opinion, we submit it would have been wholly immaterial. A possible or hypothetical or conjectural, or even an exceptional or occasional use of an article cannot determine its dutiable character. Its dutiable classification is to be determined by its general or predominant use.

Hartranft vs. Langfeld, 125 U. S., 128.

The fact that a smoker might or could use loose pieces of cigarette paper not bound in a cover would not constitute such articles smokers' articles for dutiable purposes, any more than the fact that a smoker might use copying paper to roll a cigarette in, or a small scissors to cut off the end of a cigar, or a small pasteboard box to carry tobacco in, would constitute such articles smokers' articles. At folio 47, the Court said to the jury: "I cannot express it to you any more simply than that you determine exactly what is a smoker's article, as you would what is a fisherman's article. A fisherman, when he goes to fish, has to have certain things to prosecute his sport with." Now, a fisherman is usually a man of ready resources. If he lost his fishing pole, he might use his umbrella for the purpose. If he lost all his hooks, he might and probably would bend a pin to answer his purpose. If he lost his sinker, he might tie a stone to the end of his line, and the illustrations might be indefinitely multiplied. But surely, if the tariff imposed a very high tax on fisherman's articles, it would not be contended that the articles

mentioned would be dutiable under it because they *could be* used by fishermen, nor would testimony that they could be so used be competent or proper in a suit to recover taxes assessed upon them as fishermen's articles.

We submit that this testimony was improperly received, and was calculated to mislead the jury.

As to the testimony referred to under Points I. and II., it should be noted that not only was it taken under objection and exception, but that, at the close of the case, a motion was made to have it withdrawn from the jury; but the motion was denied, and exception taken (fol. 34).

III.

In determining the dutiable character of the merchandise, reference should have been had solely to its condition when imported; and it was error for the Court to refuse so to instruct the jury.

The rulings of the Court on this point, which we contend to be erroneous, appear in our specifications of error numbered 7, 8, 9, 10, pages 6 to 9 of this brief.

We respectfully contend that, to entitle a Collector of Customs to levy a tax on merchandise as a smoker's article, the article must, *in its condition as imported*, when the Collector opens the case which has been brought from the ship and examines the article, be such an article as would be recognized in the market *in that condition* as a smoker's article. The testimony was uncontradicted (fol. 31) "that as an article of retail sale or jobbing and sale to the retail dealers the paper has always been sold in this country

in the form of books, consisting of a certain number of leaves of the paper cemented together and to the cover." None of the merchandise imported was in that condition, and therefore none of it was a smoker's article within the meaning of the law.

In Worthington vs. Robbins, 139 U. S., 337, this Court (speaking through Mr. Justice BLATCHFORD), says: "In order to produce uniformity in the imposition of duties, the dutiable classification of articles imported must be ascertained by an examination of the imported article itself in the condition in which it is imported."

This rule was reaffirmed by this Court in the case of Dwight vs. Merritt, 140 U. S., 213, Mr. Justice LAMAR saying: "All the various questions of utility and adaptation of the merchandise imported are not supposed to enter into the decision of the Collector in determining its dutiable classification under the rule in Worthington vs. Robbins."

The Court seems to have been led into error by the fact that two different articles, viz., paper and covers, each of which was a material for smokers' articles, had been imported by this plaintiff in error, and were involved in the same suit. Yet these circumstances had nothing to do with the question of classification. Suppose the paper had been imported by Isaac and the covers by Jones, would the fact that it was possible to combine Isaac's paper with Jones' covers, so as to make a smoker's article, viz., a cigarette book, entitle the United States to make Isaac pay the smoker's article tax on his paper, and Jones pay the same tax on his covers. And if not, can the separate articles separately imported (for the paper was imported at New Orleans and the covers at New York and transported in bond to New Orleans) be made to pay a tax as smokers' articles, because there was one importer for both, instead of two. It will be observed that the Court repeatedly charged the jury in substance that if the paper and the

cover *could be made into* a smokers' article by putting one inside the other, the Government was entitled to a verdict. Thus, at folio 44, the following proposition was charged :

" If the jury find that the smoker himself, by simply placing the package of small leaves of cigarette paper within the cover, and placing the rubber band which adheres to the cover around the cover and the package of small leaves of cigarette paper, can use the book of cigarette paper for all the purposes to which a book of cigarette paper is put by smokers, then the jury should find for the defendant."

As the testimony was uncontradicted (fol. 31) that the covers in controversy and such portion of the paper as had been used for books was made into cigarette books, the completed smoker's article, at an expense of about four hundred dollars for hire of workmen to do the work, and that " a portion of the paper as imported was sold directly to manufacturers of cigarettes to be used in their factories in the making of cigarettes for sale as a manufacture and article of commerce, how could the fact that a certain combination of the imported articles could possibly or hypothetically be made, control their classification for duty? They were not laid together as imported, none of them ever were laid together without further process of manufacture, as shown by the uncontradicted evidence, and some of the paper was never laid in a cover at all, but was used as part of the raw material for making cigarettes. What might be done with them, what was designed to be done with them, what was thereafter actually done with them, could not be known to the Collector when it became his duty to classify and assess duty upon them. The sole question for him was, What are they now? Are these little pieces of paper or are these covers *now* just as I find them in the packages, each considered by itself, without reference to anything else, such articles as

—not hypothetically, but practically and commercially—are completed smokers' articles? We submit this question could be answered only in the negative, and therefore the smokers' article duty could not lawfully be exacted.

IV.

Upon the testimony there was no question that the articles imported were materials for smokers' articles and not parts of smokers' articles, and it was grave and prejudicial error for the Court to charge the jury that this was a question in dispute and doubt to be determined by them.

Testimony had been given by the plaintiff as follows: "That it was the intention of the plaintiff at the time of importation and his motive in making said importation in said form to manufacture the said material into what are known as cigarette books; that the process of such manufacture is to separate the paper as imported where the colored leaves or subdivisions are located in the paper as imported, and with a brush cover one edge of the paper with flour paste, glue, or some adhesive cement adapted to cement leaves together at one edge, and then cement the paper into the covers as they are imported; that as to and concerning this particular importation a large portion thereof was so put up and cemented into books by the plaintiff after the same came into his possession by withdrawal and payment of duties. This was done at the expense of about $400 for hire of workmen to do the work; that a portion of the paper as imported was sold directly to manufacturers of cigarettes, to be used

in their factories in making cigarettes for sale as a manufacture and article of commerce."

Not a particle of this testimony had been contradicted or in any way shaken or impeached. No testimony whatever had been offered on behalf of defendant except the improper evidence considered under Points I. and II., that another kind of cigarette paper was used without a cover and this kind "can" be. Yet the Court again and again charged the jury that it was a question for them to determine whether the articles as imported were parts of smokers' articles or materials for smokers' articles. The following portion of the charge will serve as illustration, but the same error runs through all the rulings on the requests, and the charge as made (fol. 49):

"If the jury find they are such things as, when combined with other things, make smokers' articles, but are not used by smokers until so combined by some process beyond merely laying the things together, then under the statute they are the materials for smokers' articles, but not smokers' articles.

"The converse of the proposition would be true—that, if they were used by smokers when they were merely put together without any process of manufacture or construction, then they would be smokers' articles, leaving it to you, as a question of fact, whether there was in this case the mere putting of the two things together without any other process. If the merely laying them together enables the smoker to use them, and he did use them without any process except that of laying them together, they would be smokers' articles; but if, on the other hand, there was a process of manufacture or combination beyond laying together, then they would be materials for smokers' articles and not smokers' articles."

Now, there was not a scintilla of evidence in the case that as to these articles any smoker "did use them without any process except that of laying them to-

gether," nor was there the slightest attempt made to contradict the evidence that "there was a process of manufacture or combination beyond laying together."

From the time the plaintiff in error rested his case till the time the jury retired to its deliberations, the theory on which all the Court's rulings seem to have been based was that the jury might set over one against the other the *facts* as established by sworn testimony on the one hand and the *conjectures as to possibilities* of a subordinate government official on the other hand, and indicate their preference between them. We submit that a more serious error or one more harmful to a citizen suing to recover an alleged unlawful exaction could not have been committed.

V.

Even if the articles as imported could have been regarded as "parts" of smokers' articles, they would not have been dutiable as smokers' articles.

By reference to the rulings of the Court cited under the 6th, 7th, 8th, 9th, 13th and 14th specifications of error, it will be plainly seen that the Court repeatedly in effect charged the jury that if the articles as imported were *parts* of smokers' articles, they were dutiable as smokers' articles,

Under the decisions of this Court such a charge was clearly erroneous.

In Robertson vs. Gerdan, 132 U. S., 454, ivory piano keys had been claimed to be dutiable as "musical instruments of all kinds." In overruling the contention this Court said:

"If Congress had intended, in either enactment of

the Revised Statutes, to impose the same duty on parts of musical instruments which it imposed on musical instruments, it would have been easy to impose that duty on 'musical instruments of all kinds, and parts of the same.'

"It is very clear to us that the fact that the articles in question were to be used exclusively for a musical instrument, and were made on purpose for such an instrument, does not make them dutiable as musical instruments."

This Court has more recently had occasion to pass on this proposition in the case of U. S. vs. Schoverling, decided November 7th, 1892. In that case Schoverling, Daly & Gales had imported gunstocks. A. Schoverling & Co. (Mr. Schoverling being a member of both firms) had imported gun-barrels to which these stocks were intended to be united to make completed guns. The Collector and Board of General Appraisers decided that the gunstocks were dutiable as breechloading shotguns. This Court, affirming the U. S. Circuit Court, decided that the gunstocks were dutiable as "manufactures composed wholly or in part of metal." The Court (per Mr. Justice BLATCHFORD) said: "In the present case the intent of the importers to put the gunstocks with barrels separately imported, so as to make here completed guns for sale, cannot affect the rate of duty on gunstocks as a separate importation" (citing Merritt vs. Walsh, 104 U. S., 694).

So here we contend that the intent of the importer to put the cigarette paper with covers separately imported so as to make here completed cigarette books, for sale as smokers' articles, cannot affect the rate of duty on cigarette paper or covers as a separate importation.

The Act of 1883 provided in paragraph 163 for anchors and parts thereof, in paragraph 208 for penholders or parts thereof, in paragraph 377 for carpets and carpetings or parts of either, in paragraph 412

for carriages and parts of, in paragraph 413 for chronometers and parts thereof, in paragraph 414 for clocks and parts of clocks, in paragraph 438 for grindstones finished or unfinished, in paragraph 494 for watches and parts of watches, and in paragraph 662 for libraries or parts of libraries. But paragraph 476 does not provide for parts of smokers' articles, and it seems like judicial legislation to hold that parts of smokers' articles are dutiable as smokers' articles, when Congress has felt called upon, when it wished parts to pay the same duty as the whole, to specifically so declare.

VI.

There was no proof in the case of any intent to evade duties or defraud the revenue, nor any facts established from which such an intent could properly be inferred, and the suggestions in the Court's charge and rulings that the jury might properly consider whether such an intent existed was manifest error, and of a kind most prejudicial to the plaintiff in error.

The rulings tainted by this error appear in our 5th, 10th and 14th specifications of error.

It will be observed that when the Court was asked to charge the following proposition :

" A manufacturer has the right to manufacture or make his goods as he pleases, and in determining in what form or state of manufacture he will import his goods into the United States he may take into consideration the tariff laws of the United States, and so prepare his goods as to get the benefit

of a lower rate of duty if he makes no fraudulent representation or concealment of the true condition or character of the goods at the time of importation and payment of duty." The charge was given with the following limitation :

Given, the limitation would be where the thing was ready for use, but was attempted to be made to appear to be not so ready. I do not mean to say that this is this case ; it is for you to say ; but there would be the limitation " (fol. 36).

Again (fol. 43) the Court charged the jury :

" Given, unless the jury find the covers were fitted and adapted to be used by smokers in connection with the cigarette paper, and were ready to be so used without any process excepting laying together, *and were imported to be so used, but as a separate importation, merely to avoid the higher duty on smokers' articles.*"

And, again (fols. 49, 50), the jury were thus instructed :

" If the jury find that the things separately imported are imported separately *as a matter of business and not as an evasive device,* then they are the materials for the articles, but not the articles themselves ; but if the jury find the things, though imported separately, were designed, without any expenditure beyond being put together, to be put and sold together, *and were imported separately merely to escape a higher rate of duty and not from motives of business,* then the separate things are to be classed as parts of a whole, and not simply as materials."

All this use of the words " evasive device," " ready, but attempted to be made to appear to be not so ready," &c., was calculated to, and doubtless did, produce on the minds of the jury the impression that there was something crooked about this transaction. There was no evidence whatever of this. On the contrary, the legitimate inferences to be drawn from the facts established were all the other way. The plaint-

iff in error had imported his paper at New Orleans, and his covers at New York. Had he supposed it was necessary in order to avoid the duty on smokers' articles to keep one out of sight of the officer who was considering the tax on the other, he might have paid duty on his covers in New York and then shipped them to Louisiana. But instead of this he enters them at New York for immediate transportation in bond without appraisement to New Orleans, and has them come before the same taxgatherer who has the paper. Upon the trial he goes on the witness stand and frankly states that part of the paper was to be combined with the covers, and how the combination was to be made. Not a fact was proven or suggested upon the trial which in any way brought in question the entire good faith of the whole transaction. Yet in face of all this, and of the well-known readiness of the community to seize with willing credulity upon any suggestion of fraud in the importation of dutiable merchandise, the jury was given the impression that there might be something immoral about the separate importation of this paper and these covers.

The theory that merchants should so make, prepare or ship their goods as that they will be subject to the highest possible tax is happily not favored by the judicial department of the Government. The idea that Mr. Isaac should have spent his four hundred dollars on converting the paper and the covers into cigarette books on the other side of the ocean, in order not only that the Government might be entitled to a tax of seventy per cent. instead of fifteen per cent., but that it might assess this increased tax on a value greatly enhanced by the completed process of manufacture, is one the bare statement of which is its complete refutation.

The true doctrine on this question is laid down by this Court in the case of Merritt vs. Welsh, 104 U. S., 694, in the following language :

"Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true; has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss; if they are not less marketable, who has a right to complain?

"It may be that our tariff of duties is evaded by giving to sugars in the process of manufacture a low grade of color. If this be so, it is no more than every manufacturer does—namely, so to manufacture his goods as to avoid the burden of high duties, provided he can do it without injuring their marketability, or injuring it less than the duties involved. So long as no deception is practiced, so long as the goods are truly invoiced and freely and honestly exposed to the officers of customs for their examination, no fraud is committed, no penalty is incurred."

Yet it was almost this identical language which the Court below refused to charge except as coupled with a suggestion unwarranted by the evidence and contrary to the rulings of this Court in the case of U. S. vs. Schoverling.

It seems impossible to resist the conclusion that the Court below not only neglected and refused to correctly explain to the jury the principles of law applicable to the case as they had been expounded in this Court, but planted in their minds an idea contradicted by the evidence, contrary to law, and in the highest degree prejudicial to the plaintiff.

VII.

The term smokers' articles as used in the tariff act of 1883 meant articles which, in the condition in which they were imported, would be recognized by smokers and dealers who supplied them as completed smokers' articles.

This subject has been touched on under other points, but is separately introduced here as the text for a few words in conclusion.

It is not necessary to strain the language of this provision in order to give it ample scope. Tobacco pouches, meerschaum cigar holders, snuff boxes, cigar and cigarette cases of plush and leather, cigarette books, smokers' sets in wood, china and metal consisting of receptacles for cigars, matches, ashes, &c., and an infinite variety of other articles are imported in large quantities, which are subject to this tax. The tax has been made very high, presumably on the theory that these articles are pre-eminently luxuries. But, if we are to go back of the completed article to antecedent stages of manufacture, where is the line to be drawn? If cigarette paper cut in small sizes is to be dutiable as a smokers' article, why not the larger sheets from which the small sizes are cut? If the fact that the paper is to be used for cigarette books or cigarettes to be supplied to smokers makes it a smoker's article, why should not briar-wood imported by a pipe manufacturer be dutiable as a smoker's article? If the intent of the importer or his purpose in importing them is to govern their classification, why should not the revenue laws of the United States be amended so as to require every importer in making entry of his goods to take oath as to the purpose of their importation and their ultimate destination. If a possible or conjectural use

to which they may be put is to govern their classification, then the amount of revenue collected at the several ports will depend largely upon the ingenuity and liveliness of imagination of the several collectors.

It is respectfully submitted that the true way for a Collector to determine what articles are properly dutiable as smokers' articles is to go to several cigar stores or other establishments which deal in smokers' supplies (direct to the consumer) and find what articles are sold by such dealers to smokers to be used by them, and on such articles and such only to assess 70 per cent. duty under this provision. And it is safe to say that in no such store will he find offered to smokers empty cigarette covers or unbound cigarette paper of the size, quality and consistency of Mr. Isaac's importation.

VIII.

The judgment should be reversed.

CHARLES CURIE,
D. IVES MACKIE,
Attorneys for Plaintiff in Error.

W. WICKHAM SMITH,
Of Counsel.

148 U.S. 648

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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HERMANN ISAAC, PLAINTIFF IN error,
vs.
BENJAMIN F. JONAS, COLLECTOR, etc.
} No. 142.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1892.

HERMANN ISAAC, PLAINTIFF IN error,
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No. 142.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF.

I.

THE BRINGING INTO THE COUNTRY OF THE MERCHANDISE UPON WHICH SUIT IS BROUGHT WAS, IN EFFECT, A SINGLE IMPORTATION.

Hermann Isaac, the plaintiff in error, doing business in New Orleans, La., imported from France by way of Havre and New York, in August, 1885, "twenty-three cases paper covers for cigarette papers."

The merchandise was received in New York July 15 and was received in New Orleans, in bond, August 19.

The invoice is from L. Lacroix, Fils, Angoulême.

Said plaintiff in error also imported, at New Orleans, by way of Liverpool, in August, 1885, "twenty-nine cases cigarette papers."

The invoice is from L. Lacroix, Fils (Rec., p. 10).

It will be noted that all of this merchandise was obtained by plaintiff in error from L. Lacroix, Fils, Angoulême, France, and was withdrawn from the custom-house at New Orleans for consumption.

The petition filed as the commencement of the suit sets forth the importation of the paper, for making cigarettes, from France, August 10, 1885 (p. 1) and states (p. 2) "that this defendant also imported from France, * * * twenty-three cases of a manufacture or pasteboard."

In the agreed case, it is stated (p. 13, fol. 26) "that said plaintiff imported said goods and merchandise described in plaintiff's petition herein from a foreign country or place, as set forth in the petition," etc. And it is further stated (p. 14, fol. 27) that the entries for withdrawal for consumption of the "covers" and the cigarette paper were simultaneously made by the plaintiffs at the custom-house at New Orleans.

Therefore it appears that Isaac obtained from a manufacturer or tradesman in Angoulême, France, the "cut cigarette paper" and the "covers" involved, and caused them to be brought to New Orleans, and entered them simultaneously for withdrawal for consumption.

The papers of the plaintiff repeat three times (pp. 4, 5, 6) the legend: "Hermann Isaac, sole agent and attorney-in-fact for the U. S., 69 Canal street," and the plaintiff shows (p. 16, below middle):

> That as to this particular kind or manufacture of paper the plaintiff was the sole importer thereof into the United States by special arrangement with the foreign manufacturers thereof.

It is to be inferred that L. Lacroix, Fils is the manufacturer and that not only this importation, but all importations into the United States of this specific class of goods, were under the control of this plaintiff.

Under these circumstances counsel for the defendant deems himself justified in urging that the bringing in of the "covers" and the "cut cigarette papers" was but one transaction.

II.

IT WAS THE INTENT AND MOTIVE OF THE IMPORTER TO PLACE THE TWO PARTS TOGETHER UPON THEIR REACHING THE UNITED STATES.

The condition of the paper when imported is described on pages 13 and 14 of the Record, and a further description of its condition and use is set forth on the first half of page 16.

The covers were in condition to receive the cut paper and the cut paper was in condition to roll around loose tobacco in making cigarettes, and was fit for no use whatever except in cigarette-making, and the covers were useless for any purpose except that of holding or protecting cigarette paper.

Plaintiff says (p. 16) that it was his intention and motive, in making the importation, "to manufacture the said material into what are known as cigarette books," and adds that he did so manufacture a large portion thereof at considerable expense, but that "a portion" of the paper was sold directly to cigarette-manufacturers.

That such portion was so sold is without weight in view of the admitted intent and motive of the importation.

The ambiguities of the word "manufacture" as used by the importer appear quite plainly.

The pasting together (which does not appear to have been necessary) after the importation is not of sufficient importance or effect to change the unity of the importation or the character of the thing imported.

The importation was at all times included within the classification of "all smokers' articles whatsoever," of the statute.

III.

THE ENACTMENTS AND THE MAIN CONTENTION.

Upon appraisal and assessment the merchandise was classified under the "Smokers' articles" paragraph of the tariff act of 1883 (Schedule N, 22 Stat., 513) and was charged a duty of 70 per cent ad valorem.

The importer protested that the classification should have been under the "Paper, manufactures of" paragraph and that the duty should have been only 15 per cent ad valorem, (Schedule M, *id.*, 510).

The respective paragraphs are these:

Pipes, pipe bowls, and all smokers' articles whatsoever, not specially enumerated or provided for in this act, seventy per centum ad valorem; all common pipes of clay, thirty-five per centum ad valorem.

Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act, fifteen per centum ad valorem.

Did the merchandise imported consist of smokers' articles, or should it have been classified as manufactures of paper?

IV.

THE JURY WAS PROPERLY INSTRUCTED AS TO ITS RIGHT TO FIND UNDER THE IMPORTATION PROVED.

The method of importation adopted in this case was of itself sufficient to justify the jury in finding that the whole transaction was a scheme to evade the revenue laws.

The instructions given to the jury upon the trial, to the effect that if the jury should find that the manufacture was practically completed in the foreign country, and that the separate importation was merely to avoid the higher rate of duty on smokers' articles, an evasive device, "then the separate things are to be classed as parts of a whole, and not simply as materials," was correct, and was justified by the facts and circumstances surrounding the importation.

If the two parts had come in together and had been included in one invoice, much of the argument of the learned counsel appearing for plaintiff would not apply.

Had said parts so come, could it be said that the placing together and the application of flour paste would have

constituted a manufacture to such an extent as to create a new article? Most certainly not.

The case presented by the evidence is not practically different from the one supposed.

If the leaf is pasted to others, or to the cover, it can be used only by detaching it.

The leaf is in condition for use before it has ever been attached, and if it is pasted in it can only be consumed after it has been detached. It was perfectly prepared for use as imported, and, after pasting, could never be used except by returning it to its previous condition.

The sheets could have been held by the rubber band which adheres to the cover (Rec., p. 23, top); plaintiff's brief (p. 16, top).

It can not be properly said that the placing of these sheets within the cover and its band is a manufacture, or makes a new article. Neither will the adding of an application of paste to the edges of one side, before placing in the cover, constitute a manufacture in this case of importation by one consignee from one foreign manufacturer.

The jury was properly permitted to find that the thing imported was a smoker's article.

V.

NO CASE HAS BEEN DECIDED BY THIS COURT WHICH CONTROLS THE CASE AT BAR.

(1) The general declarations set forth in the opinion in the sugar case of *Merritt* v. *Welsh* (104 U. S., 694), and quoted in plaintiff's brief, do not control this case.

In this case the precise question, as applied to the cut paper, is, Is this cigarette paper to be classified with smokers' articles or is it merely material for smokers' articles? This is the vital question and no similar or analogous question was involved in the sugar case.

If this paper, when it came into port, was in fact and under the statute a smoker's article, there is nothing in *Merritt* v. *Welsh* that permits its entry at the lower duty.

(2) The decision in *Robertson* v. *Gerdan* (132 U. S., 454) does not determine the case at bar, because the ivory for the keys of pianos and organs matched to certain octaves, to be sold to instrument-makers to scrape and attach to wood, involved in that case, falls very far short of constituting a musical instrument.

But if the importation had been a dozen pianos without keyboards and a dozen keyboards that had never been placed in pianos—all imported by the same dealer and constructed by the same maker—with the intent and motive of putting the parts together here for sale, it is respectfully submitted that it would have been held that the whole transaction constituted an importation of musical instruments.

(3) This case is not controlled by *Worthington* v. *Robbins* (139 U. S., 337). It was there held that "white hard enamel" used for various purposes, including the making of faces of watch dials, was not part of a watch or watch material.

It was shown that before the enamel could be applied it must be changed by grinding and pulverizing and new processes of manufacture.

The article when imported did not show its adaptation to the making of watches.

(4) The case is distinguishable from *United States* v. *Schoverling* (146 U. S., 76) in the fact that there only the importation of the gunstocks was involved, and no question of the importation of the barrels for the guns was involved.

If Schoverling, Daly & Gales, who imported the "twelve finished gunstocks, with locks and mountings," had imported the gun barrels also—receiving all from the same manufacturer—and had taken them from the custom-house together, with intent to make complete guns of those stocks and barrels, it is respectfully urged that the whole transaction would have constituted an importation of guns.

VI.

MINOR OBJECTIONS.

(*a*) The admission of the evidence contended against in point I of plaintiff's brief was not error.

It tended to show that cigarette paper was often used without covers and that such use was practicable and common, and therefore that the paper when, and as, imported was in condition for use as a smokers' article.

No question of similitude was involved, but a question of practical use and capacity for use.

Testimony showing that cigarette paper cut like the paper in question was often used as a smokers' article when the leaves were held together by the application of an elastic band, was testimony as to the completeness of this article for use when imported.

It was evidence that the paper was ready for use and was in the same condition in which much cigarette paper handled in the trade and consumed, actually was when retailed by the dealer to the consumer.

It seems to be impossible that the jury could be misled by the testimony complained of.

(*b*) The objection elaborated under plaintiff's point II is of like character.

The testimony showed that the paper could be used in accordance with the purpose for which it was made to be used, without pasting or placing in covers.

It is unreasonable to claim that the witness should have been confined to this precise paper, or to paper obtained of Lacroix Fils, when he testified as to the use of cigarette paper in general, and that this paper might be manipulated in the same manner and with a like result.

The witness was testifying as to a fact, not as to a guess or conjecture.

The pasting of the paper in the covers was not necessary to be done; if done, it was an intermediate act which might or might not tend to convenience, and the act was necessarily undone before the leaf could be used.

It would, it is respectfully submitted, be giving considerable consequence to trivial things to set aside verdicts upon grounds like these.

LASTLY.

It is respectfully submitted that the judgment should be affirmed.

A. X. PARKER,
Assistant Attorney-General.

APPENDIX.

Deeming that it may be permissible to call attention to a public record set forth in compliance with a general statute and appearing in the Patent Office relating to the class of merchandise involved in this importation, and to the declared relations thereto of the manufacturer and of this importer, counsel begs to refer to the trade-mark records of the Interior Department, showing as follows:

TRADE-MARK.

L. LACROIX, FILS.

CIGARETTE PAPER.

No. 8,971. Registered Dec. 27, 1881.

RIZ LA + F.

RIZ LA +.

Witnesses:

FREDK. HAYNES.
ED. MORAN.

Inventor:

LÉONIDE LACROIX,
By his attorneys,
BROWN & BROWN.

UNITED STATES PATENT OFFICE.

LÉONIDE LACROIX, FILS, OF ANGOULÊME, FRANCE.—TRADE-MARK FOR CIGARETTE PAPER.—STATEMENT AND DECLARATION OF TRADE-MARK NO. 8971. REGISTERED DECEMBER 27, 1881.—APPLICATION FILED OCTOBER 6, 1881.

STATEMENT.

To all whom it may concern:

Be it known that I, Lêonide Lacroix, Fils, a citizen of the Republic of France, residing and doing business at Angouléme, in the Department of Charente, in the Republic of France, have adopted for my use a trade-mark for cigarette paper, of which the following is a specification.

My trade-mark consists of the arbitrary symbol of a cross preceded by the words "Riz la" and followed by the letter "F." These have generally been formed and arranged as shown in the accompanying facsimile and the whole inclosed within a rectangular border, but the letter "F" and the border may be entirely omitted, and the remaining letters may be formed in any desired manner or style without materially altering the character of my trade-mark, the essential features of which are the words "Riz la" and the symbol of a cross following the words.

This trade-mark I have used in business since the month of November, 1869.

The class of merchandise to which this trade-mark is appropriated is paper, and the particular description of goods comprised in such class on which I use said trade-mark is thin paper of my own manufacture for use as cigarette paper. This paper is usually cut to the proper size for use and bound in small books, and I use the trade-mark by printing or otherwise delineating it upon the covers of such books.

The trade-mark may also be used by delineating it upon boxes containing the cigarette paper and on paper

or cloth wrappers for covering packages of the paper. I may also use it in any other of the ways in which trade-marks are commonly used.

LÉONIDE LACROIX, Fils.

Witnesses:
CHADOUTEAU.
GUIONNET.

The declaration follows and is in the usual form.

TRADE-MARK.

H. ISAAC.

CIGARETTE PAPER.

No. 20,582. Registered Jan. 12, 1892.

L
L
F

Witnesses:
CHARLES SCHROEDER.
CHARLES D. BLES.

Proprietor,
HERMANN ISAAC.
By GOEPEL & RAEGUIER,
Attorneys.

UNITED STATES PATENT OFFICE.

HERMANN ISAAC, OF NEW YORK, N. Y.—TRADE-MARK FOR CIGARETTE PAPER—STATEMENT AND DECLARATION OF TRADE-MARK NO. 20582, REGISTERED JANUARY 12, 1892—APPLICATION FILED DECEMBER 12, 1891.

STATEMENT.

To all whom it may concern:

Be it known that I, Hermann Isaac, of the city of New York, in the county and State of New York, and doing business at No. 280 Broadway, in said city, have adopted for my use a trade-mark for cigarette paper, of which the following is a full, clear, and exact specification.

My trade-mark consists of the letters "L L F," which are preferably arranged one below the other, as shown in the accompanying fac-simile, on which they appear in plain capitals, printed in black, on a vertical line; but other forms of type may be employed, or the trade-mark may be differently arranged, without altering the character of the same, the essential feature being the letters "L L F."

This trade-mark has been used continuously by me in business since December 1, 1881.

The class of merchandise to which said trade-mark is applied is paper, and the particular description of goods comprised in such class on which it is used is cigarette paper.

It has been my practice to mark the trade-mark on the outside of the books in which the cigarette paper is made up, or to print the same on the labels or tickets applied to the boxes or packages in which the cigarette paper is shipped, or by stenciling, painting, or stamping it on said goods.

Signed this 10th day of December, 1891.

HERMANN ISAAC.

Witnesses:

PAUL GOEPEL,

CHARLES SCHROEDER.

The declaration follows, and is in the usual form.